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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1617

LEON O. RIGGS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1635

FRED G. AMICK, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1637

H. R. NASH, PETITIONER

v.

UNITED STATES OF AMERICA

No. 6964

DAVID R. MAYNE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (see Amick Petition No. 1635, pp. 1a-33a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 1971. Petitions for rehearing were denied on March 29, 1971. Petitions for writs of certiorari were filed by Riggs on April 23, 1971, by Amick and Nash on April 26, 1971, and by Mayne on April 27, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was reversible error in the manner in which the indictment was drawn or in the fact that language used in count one, which was dismissed by the trial court, was incorporated by reference in other counts upon which convictions were obtained (No. 1635).

2. Whether the grand and petit juries were improperly selected because a substantial part of the array was chosen by the "keyman" system (Nos. 1635 and 1637).

3. Whether, after a thorough exploration of the fact that shortly before trial a co-defendant inquired indirectly if a juror might be prejudiced against him, the court properly concluded that the incident did not justify a mistrial (Nos. 1617 and 6964).

4. Whether the evidence supported the conviction of petitioner Amick (No. 1635).

5. Whether the trial court erred in refusing to vacate a plea of *nolo contendere* entered by petitioner Nash (No. 1637).

STATEMENT

An indictment returned in the United States District Court for the Southern District of Indiana charged petitioners and others in various substantive counts with fraud in the offer and sale of securities and of conspiracy to commit these offenses, in violation of Section 17(a) of the Securities Act of 1933, 15 U.S.C. 77q(a), and of 18 U.S.C. 371 (App. 36-75). Prior to trial, petitioner Nash entered a plea of *nolo contendere* as to a portion of the charges; the other charges against him were then dismissed. After a trial by jury, the remaining petitioners were convicted on various substantive counts; all were acquitted on the conspiracy charge. Sentences subject to the parole eligibility provisions of 18 U.S.C. 4208 (a)(2), were imposed as follows: Riggs, a total of three years (App. 316-317)[1]; Amick, a total of six years (App. 303-304); Nash, a total of four years (App. 313-314); and Mayne, a total of four years (App. 308-309). The court of appeals affirmed, except that it set aside the conviction of Mayne on a count upon which a concurrent sentence had been imposed (Amick Pet. 33a).

The charges arose out of fraudulent conduct of petitioners in various offerings of stock by Air and

[1] "App." refers to appellants' two-volume Appendix in the court of appeals which we are lodging herewith.

Space Underwriters, Inc. (ASU), a corporation formed in May 1963 to take over the business of Umbaugh Aircraft, which prior to institution of bankruptcy proceedings in 1962, had been engaged through a subsidiary in developing a gyroplane (an aircraft roughly similar to a helicopter). Amick was chairman of the board of ASU until his resignation in January 1965; Riggs was a salesman of the stock of ASU; Nash was sales manager for the gyroplane and active in the sale of ASU stock; and Mayne was president of Securities Services, a corporate defendant which was active in the sale of ASU stock.

In late April or early May of 1963, Amick and co-defendant Irving [2] proposed to Raymond E. Umbaugh, president of Umbaugh Aircraft, that ASU be formed to take over its business. Umbaugh agreed to support the plan, in return for a substantial block of ASU stock. Amick and Irving represented to the bankruptcy court that they and their associates would finance the program, estimated by Irving to amount to $1,500,000. On the day before the submission of the plan to the bankruptcy court an attorney advised Amick, Umbaugh and others that the transfer of a block of ASU stock to Umbaugh would be in direct violation of an earlier order of the bankruptcy court that Umbaugh could have no interest in any successor to the bankrupt corporation (Tr. 595-596, 3405).[3] To overcome this obstacle, one Streets, a distributor of Umbaugh Aircraft stock, was substituted for Um-

[2] Irving has a pending petition for a writ of certiorari (No. 1375, this Term) to which we have separately responded.

[3] "Tr." refers to the multi-volumed trial transcript.

baugh; the latter, however, remained an undisclosed principal (Tr. 597).

At a hearing in the bankruptcy court on July 22, 1963, which Amick attended, Irving testified that his personal net worth was about $1,000,000 and he was prepared to use that amount to finance the reorganization plan. He also stated that he had associates, including relatives, who would provide an additional $1,000,000. He further testified that no arrangement existed for Umbaugh to receive property or other payment in connection with the reorganization, and that he had not dealt with Umbaugh and knew of no one interested in the plan who had been dealing with Umbaugh. Both Amick and Irving remained silent while their attorney represented to the court that ASU had no present arrangement for a public issuance of stock (Defdt. Exh. 126-127, 134-135, 148-150, 152, 153). The actual fact was that Umbaugh was involved and that Amick and his associates had previously made plans for the issuance of the stock (Tr. 3407, 3421, 3494-3495, 3498, 3501).

One week later (July 29, 1963) arrangements for a public offering of stock were completed at an ASU board meeting (Tr. 603, 612-613). The first sale of stock was made on August 14, 1963, the day on which the bankruptcy court entered its formal order approving the amended reorganization plan (Defdt. Exh. E). Between August 1963 and July 1965, in excess of $2,100,000 worth of stock was publicly sold through the efforts of petitioners. These sales were accompanied by numerous misrepresentations concerning such matters as the number of orders which

existed for the gyroplane, its price, and actual and anticipated production plans. At the same time, petitioners failed to disclose, *inter alia*, the serious financial difficulties being experienced by the company in its operations. In summarizing the record in this regard, the court below stated (Amick Pet. No. 1635, p. 2a):

> It appears, virtually beyond dispute, that during this period [of the public offerings] the effort to promote sales of ASU stock included general releases and individual communications which contained untrue statements of material facts, omitted material facts necessary to make the statements made not misleading, and included devices to defraud and practices which would operate as a fraud upon the purchaser. * * *

ARGUMENT

1. The opening paragraph of count 1 charged, in the language of Section 17(a) of the Securities Act of 1933,[4] that Amick and other named defendants in the offer and sale of securities "(1) did employ devices, schemes, and artifices to defraud; (2) did obtain money and property by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; and (3) did engage in transactions, practices, and courses of business which would and did operate as a fraud and deceit

[4] The statute is set out in the Amick Petition No. 1635 at p. 5.

upon purchasers of the common stock of ASU * * *" (App. 36-37). This general statement was followed by a particularized account of the development and execution of the overall plan (App. 37-50), the false representations which were made, specifying 14 instances (App. 50-51), and the failure to state material facts, specifying ten instances (App. 51-52). It was alleged in paragraph 4 of that count that Amick and certain named co-defendants on a described occasion used the mails in the furtherance of the plan (App. 52-53). Counts 2 through 38 were identical with count 1 as to paragraphs 1-3 of that count incorporating those paragraphs by reference; the critical difference was that each of the remaining counts varied as to the co-defendants named with Amick and charged a separate use of the mail for the sale of securities to separate purchasers (App. 53-68).

a. Contrary to the contention of petitioner Amick (Amick Pet. 11-13), the counts were not rendered duplicitous because each method of violating 15 U.S.C. 77q(a) was charged in the conjunctive in each count.[5] See *Crain* v. *United States*, 162 U.S. 625, 634; *United States* v. *Lennon*, 246 F. 2d 24 (C.A. 2), certiorari denied, 355 U.S. 836; *United States* v. *Warner*, 428 F. 2d 730, 735 (C.A. 8); *United States* v. *Greenberg*, 30 F.R.D. 164, 169 (S.D. N.Y.); *Weiss* v. *United States*, 122 F. 2d 675, 680-681 (C.A. 5); *United States* v. *Crummer*, 151 F. 2d 958, 963-964 (C.A. 10). An indictment so framed does not prejudice an accused, because a verdict of guilty upon

[5] Amick was convicted on eight of the twenty-seven counts which had been submitted to the jury.

proof that the accused has done any of the acts charged will act as a bar to subsequent prosecution for any of the matters therein alleged. *Crain* v. *United States, supra,* 162 U.S. at 636. As the court below held (Amick Pet. 6a-7a), the indictment here clearly met the requirements that it apprise the accused with reasonable certainty of the nature of the charges against him, so that he could prepare his defense and be able to plead the judgment as a bar to any subsequent prosecution for the same offense. Cf. *Vandersee* v. *United States,* 321 F. 2d 57 (C.A. 3); *United States* v. *McGuire,* 381 F. 2d 306, 318-319 (C.A. 2); *United States* v. *Greenberg, supra.*

b. Under Rule 7(c), F. R. Crim. P., "[a]llegations made in one count may be incorporated by reference in another count." Petitioner Amick contends that the language incorporated here lost its vitality since count one was dismissed (Amick Pet. 13-15). The governing law is to the contrary. Failure of proof as to the count setting forth the allegations *in full* does not vitiate the other counts which adopted its language. *Blitz* v. *United States,* 153 U.S. 308, 317; *Crain* v. *United States, supra,* 162 U.S. at 633; *United States* v. *Shavin,* 287 F. 2d 647, 650 (C.A. 7); *Parker* v. *United States,* 252 F. 2d 680 (C.A. 6), certiorari denied, 356 U.S. 964; *Bell* v. *United States,* 100 F. 2d 474 (C.A. 5); *Barnard* v. *United States,* 16 F. 2d 451 (C.A. 9), certiorari denied, 274 U.S. 736.

2. Challenges to the manner in which the grand and petit juries were selected (Amick Pet. 15-19, Nash Pet. 33-34) are answered in the government's

brief in opposition to *Irving* v. *United States*, No. 1375 this Term, pp. 9-12; we are sending copies of this brief to petitioners' counsel.

3. After the jury had been impaneled, but before the trial had begun, the court told counsel that there had been an occurrence with regard to one of the jurors which he was going to investigate (App. 609). He then questioned the juror in chambers, with only the court reporter present. The juror said that, over the weekend, co-defendant Vollmer[6] had telephoned the juror's business associate and had asked him if he thought that the juror remembered Vollmer in connection with a past business transaction. The associate communicated this information to the juror, who told the court that he had no recollection of Vollmer or the business transaction. The associate had informed Vollmer that he was certain that the juror would give him fair consideration as to any matter that might arise at trial. The juror said that he did not feel that this occurrence would in any way influence his verdict (App. 610-611).

After the reporter read the transcript of this interview to counsel, the court asked for suggestions as to the proper procedure. Counsel for petitioner Mayne moved for dismissal of the jury; the court rejected this approach noting that "it would be an easy way to keep from getting tried, particularly in a conspiracy case, to take turns creating prejudice, and nobody ever gets tried" (App. 612-614). The court stated that the juror did not have the impression that

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[6] Vollmer has also filed a petition for a writ of certiorari (No. 1678, this Term) which we are responding to separately.

anyone was trying to influence him and had reported the incident to the court because of his previous answers on *voir dire* that he knew nothing about the case (App. 615). Counsel for petitioner Riggs moved for a severance (App. 624-625). When the court overruled this motion, Riggs moved to substitute the alternate juror (App. 629); such substitution was opposed by Amick (App. 629, 631) and Vollmer wished to continue the trial with the jury as constituted (App. 627). The court outlined what it would say to the jury, to which there was no objection (App. 629-632). The court then called in the jury and advised them as follows (App. 637):

> Members of the Jury, we have had a little incident happen, as sometimes happens in the trial of cases. One of the parties, over the week-end, contacted an acquaintance and asked him a question which required the acquaintance to ask a member of the jury for the answer, thus, of course, bringing to the attention of the juror the party who asked the question in the first place. The juror very properly related this to the Clerk, who related it to me, and I have now made it known to the attorneys. And, having considered the matter very carefully, it seems to me that nothing improper was intended. It was an impropriety. It shouldn't have been done—an irregularity, if you want to call it that, but I think nothing more than that. But I mention it to you as something that you should know about. It is possible that more will be made of it than is justifiable. In case any of this should come to your attention—although it shouldn't—I thought I would make that state-

ment. It is explanatory of what has occupied me and the lawyers for the last several minutes, and, also, it is illustrative of what I keep telling you in my admonitions at times that we take a recess—that you are not to form or express an opinion about the case, that you are not to discuss it with yourselves or others or permit others to discuss it with you or in your hearing or presence, and I frequently add to that if anyone does attempt to discuss the case with you or in your hearing or presence, you should promptly report it.

And a prompt report was made in this case. I think on thorough reflection, that nothing improper was intended, although, as I say, it was an irregularity on the part of the person who did it, which I am sure will not be repeated by any party to this action. So, with that little statement, we will go on with the trial of the case. I am sure nothing out of the way will happen in the future; but if anything does, please report it promptly.

Considering the differing views of counsel and the tangential nature of the incident it was well within the court's discretion to instruct the jury as it did and then proceed with the trial. The court's statement was low-keyed and avoided any possible prejudice by pointing out that "nothing improper was intended." There can be no presumption of prejudice from this inconsequential occurrence. See, *e.g.*, *Morgan* v. *United States*, 399 F. 2d 93, 96-97 (C.A. 5), certiorari denied, 393 U.S. 1025; *Johnson* v. *United States*, 207 F. 2d 314 (C.A. 5), certiorari denied, 347 U.S. 938; *United States* v. *Sorcey*, 151 F. 2d 899

(C.A. 7), certiorari denied, 327 U.S. 794; *Wheaton* v. *United States*, 133 F. 2d 522, 527 (C.A. 8).[7]

4. The contention that the evidence was insufficient to sustain the conviction of petitioner Amick (Amick Pet. 19-22), who was at the center of the operation, is fully answered by the opinion of the court below upon which we rely (Amick Pet. 13a-16a).

5. On the day this case was set for trial, petitioner Nash and co-defendant Irving elected to withdraw their pleas of not guilty and to plead *nolo contendere* to certain counts of the indictment. Erle Kightlinger, appearing for defendant Irving, stated that Nash was not represented by counsel but that he had advised him as to the effect of such a plea. With the express permission of Nash, Kightlinger stated the counts to which the plea would be entered (App. 486-487). Addressing both defendants, the court explained the possible penalties that could be

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[7] *Remmer* v. *United States*, 347 U.S. 227; 350 U.S. 377; is clearly distinguishable. In that case an unidentified person suggested to a juror that an acquittal would be profitable for him. The court took the matter up with the prosecution alone and an F.B.I. agent questioned the juror. The defense learned of the incident only after the trial was over, by reading of it in a newspaper. In that particular context, where the juror admitted to being under "terrific pressure," this court held that it could not be said that the juror was unaffected in his freedom of action. 350 U.S. at 381. *Gold* v. *United States*, 352 U.S. 985, is comparable to *Remmer*. Neither decision is apposite to this case, where the juror attached no significance to the telephone call and the lawyer for the party who had made the call wanted to continue the trial without substitution of the alternate.

imposed, the right to trial by jury, the presumption of innocence, the right to participate in the selection of the jury and to make challenges and the nature of the plea of *nolo contendere* (App. 488-490). The court further said (App. 490):

> Now, Mr. Nash is not represented by counsel this morning, but in the past he at one time had counsel. Counsel withdrew his appearance, stating at that time Mr. Nash was financially able to hire counsel but had not completed his arrangements with counsel. Mr. Nash has never indicated to the Court that he is not financially able to hire counsel. He has appeared here as his own counsel on one or two occasions, the last being yesterday morning, so counsel has not been appointed for Mr. Nash. It has been my finding or opinion, as things have gone, that he has elected to represent himself. Is that right, Mr. Nash?

Petitioner answered affirmatively. He further stated that no one had made any representations that his plea would affect the sentence imposed; the court responded that any such representation would have been false (App. 491-492). In the colloquy which followed, Mr. Kightlinger stated that it had been his understanding with the assistant United States Attorney that the court might consider the evidence to be heard in the trial as constituting the factual basis for the plea. It was also understood that the evidence already heard by the court in a related civil action might furnish this basis (App. 492-494). All parties were sentenced after the conclusion of the trial. The court found Nash guilty on the basis of

his plea, the evidence heard by the court in the prior civil action, and upon the evidence heard at this trial; he was sentenced to imprisonment for five years. Nash was not represented at the sentencing and did not specifically waive counsel at that time (App. 509, 563).

Nash thereafter moved to set aside the judgment of conviction and to withdraw his plea of *nolo contendere* (1) because it had been agreed that the factual basis of his plea was the evidence in the civil suit, which was alleged to be inadequate to show his guilt, and (2) because he was not represented by counsel at sentencing (App. 350-354). The court refused permission to withdraw the plea beause no adequate ground therefor was stated, but held that, since petitioner did not specifically waive counsel at sentencing, he should be re-sentenced (App. 354-356). Petitioner was thereafter re-sentenced to four years' imprisonment (App. 313-314).

The crux of petitioner's present complaint—a matter which he did not raise in his original motion to withdraw his plea—is that he was denied counsel at the time of his plea. As the facts show, however, that was not the case at all. Nash, who earlier had retained counsel, chose to represent himself at the time of the plea, although he was financially able to employ counsel. Despite his vague allegations that he was promised leniency in exchange for his plea, nothing in the record supports such a claim, and he unequivocally denied at the hearing that any such representations had been made. The voluntariness of petitioner's plea was properly determined at the orig-

inal hearing, and affirmed by the court below.[8] There is no reason for plenary review of that claim by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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JUNE 1971.

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[8] In an addendum to its denial of the petitions for rehearing, the court below stated that although the district court had "carefully explained the consequence of the plea," it had "omitted explanation of the nature of the charge." The court of appeals held, however, that since the plea was entered before the decision in *McCarthy* v. *United States*, 394 U.S. 459, there was no automatic requirement that Nash be allowed to plead anew. *Halliday* v. *United States*, 394 U.S. 831 (Nash Pet. No. 1637, pp. 34a-35a). The fact that Nash had been represented by counsel at an earlier stage of the proceedings and that he had entered his plea after consultation with defendant Irving's counsel supports the view that he understood the nature of the charges against him.

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